

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

GLEN ALLEN CHAPMAN,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet.App. No. 15-3053

**ON APPEAL FROM THE
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**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the June 22, 2015, Board of Veterans' Appeals' (Board) decision that denied entitlement to service connection for a lung condition, to include as due to Persian Gulf War illness.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Glen Allen Chapman, appeals the June 22, 2015, Board decision that denied entitlement service connection for a lung condition, to include as due to Persian Gulf War illness. (Record (R.) 2-13). Appellant does not contest the dismissal of his claim for entitlement to a disability evaluation in excess of 30 percent for tension headaches, as such, this issue should be deemed abandoned. *Norvell v. Peake*, 22 Vet.App. 194, 201 (2008).

C. Statement of Facts

Appellant had active duty from June to September 1983, and from January 1985 to November 2005. (R. at 2057, 2408).

In June 2007, Appellant submitted a claim, *inter alia*, for a lung condition (R. at 2189). In May 2008, the Regional Office (RO) issued a rating decision that, *inter alia*, denied entitlement to service connection for a lung condition. (R. at 2046 (2033-37, 2041-47)). Appellant filed a notice of disagreement (NOD) in June 2008 (R. at 2031), and the RO issued a Statement of the Case (SOC) in December 2010 (R. at 1294-1324). That same month, Appellant filed a VA Form 9. (R. at 1280-81).

In January 2015, Appellant was afforded a VA respiratory conditions examination. (R. at 84-97). The examiner diagnosed Appellant with sarcoidosis. *Id.* at 84. She noted that Appellant's sarcoidosis was "found incidentally in 4/07 on routine [chest x-ray] screening pre-operatively for prostate cancer." *Id.* at 88. Further, the examiner noted the following: "Sarcoidosis is a chronic

granulomatous disease of unknown origin; it occurs across the general population. In addition, current medical literature does not link the development of, or aggravation of sarcoidosis to any specific Gulf War environmental hazards.” *Id.* at 88. She opined that Appellant’s sarcoidosis was less likely as not related to a specific exposure event experienced by Appellant in Southwest Asia. *Id.*

The RO issued a Supplemental SOC in January 2015. (R. at 70-74).

III. SUMMARY OF ARGUMENTS

The Court should affirm the June 22, 2015, Board decision that denied entitlement to service connection for a lung condition, to include as due to undiagnosed illness or medically unexplained chronic multisymptom illness because the Board adequately set forth a statement of reasons or bases for its determinations. Additionally, Appellant has articulated no valid basis for disturbing the Board’s decision. As such, the Board’s decision should affirmed.

IV. ARGUMENT

A Veteran of the Persian Gulf War may be entitled to VA benefits on a presumptive basis if he exhibits a qualifying chronic disability that manifests to a degree of 10 percent or more, prior to December 31, 2016, and which, by history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis. 38 U.S.C. § 1117; 38 C.F.R. § 3.317(a)(1)(i)-(ii). A qualifying chronic disability must result from either an “undiagnosed illness,” or a “medically unexplained chronic multisymptom illness that is defined by a cluster

of signs or symptoms.” 38 C.F.R. § 3.317(a)(2). A medically unexplained chronic multisymptom illness is “a diagnosed illness without conclusive pathophysiology or etiology, that is characterized by overlapping symptoms and signs and has features such as fatigue, pain, disability out of proportion to physical findings, and inconsistent demonstration of laboratory abnormalities.” 38 C.F.R. § 3.317(a)(2)(ii).

The Board's decision must include a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record; the statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, and to facilitate informed review in this Court. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Appellant argues that the Board erred when it determined that he did not have a qualifying chronic disability pursuant to 38 U.S.C. § 1117. (Appellant's Brief (App. Br.) at 8). In particular, he avers that the Board erred when it found that he did not have an undiagnosed illness, erroneously relying upon the January 2015 VA examiner's diagnosis of sarcoidosis. *Id.* at 8-9. As support for

his argument, Appellant contends that “[w]hile Appellant’s 2015 examination did state that [he] had a 2007 diagnosis of sarcoidosis, a review of the record shows no such diagnosis.” *Id.* at 9. Appellant claims that a June 2007 report referenced by the VA examiner was “nondiagnostic;” therefore, he was never formally diagnosed with the condition. *Id.* (citing (R. at 1426, 1893).

Appellant also claims that even if there is a valid diagnosis of sarcoidosis, he still qualifies for a presumption as a medical chronic multisystem illness that is defined by a cluster of signs or symptoms. (App. Br. at 9-10) (citing 38 C.F.R. § 3.309). Appellant explains that sarcoidosis, by definition, is a chronic multisymptom illness defined by a cluster of signs or symptoms, which is medically unexplained. (App. Br. at 10) (citing R. at 88, 1893, 1929).

Lastly Appellant argues that the Board erroneously relied on “affirmative evidence” to conclude that a qualifying chronic disability was not incurred during service in the Persian Gulf War. (App. Br. at 11). In particular, he avers that the January 2015 VA medical examiner’s reliance on the lack of a medically sound basis in medical literature linking sarcoidosis to Gulf War environmental hazards was not affirmative evidence, but rather the lack of medical evidence. *Id.* at 12. He contends that “this attempts to establish a lack of medical evidence as affirmative evidence; in other words, since the medical community cannot explain what causes the disease, exposures in the Gulf War could not have caused the disease.” *Id.*

1. Qualifying chronic disability

Appellant essentially argues that the January 2015 VA examiner's diagnosis of sarcoidosis is invalid because she relied on an earlier "nondiagnostic" reference to possible sarcoidosis. See (App. Br. at 8). However, such an argument has no basis in law or fact. As a starting point, the January VA examiner noted review of the claims file (C-file) and medical records; recorded medical history, including various test results; and diagnosed Appellant with sarcoidosis. (R. at 84-88 (84-97)). While Appellant posits that this diagnosis is *per se* invalid because of a referenced "nondiagnostic" record, it is clear that the examiner based her opinion of review of Appellant's entire medical history, including numerous diagnostic tests such as computerized tomography scans (CT) in January and August 2008, July and September 2009, August 2010, April 2012, and July 2015; a bronchoscopy in June 2007; "serial" pulmonary functioning tests from 2007 to September 2014; and numerous x-ray findings. *Id.* at 84-87.

Moreover, while Appellant argues that the initial findings were "nondiagnostic" and, therefore, unreliable, he fails to note that the examiner specifically found that the first finding of sarcoidosis in 2007 was "found incidentally." *Id.* at 88. Therefore, it is apparent that the examiner was not reliant on an "incidental" finding to base her diagnosis, but on the medical evidence of record including the numerous aforementioned tests. See *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012) (examination reports must be read as a whole and

“are adequate when they sufficiently inform the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion”). Indeed, the examiner described Appellant's specific symptomatology including persistent symptoms, chronic hilar adenopathy, pulmonary involvement, and progressive pulmonary disease, and appeared to rely on a January 14, 2015, chest CT scan rather than the initial findings of sarcoidosis in 2007. *Id.* at 86. Notably, in summarizing the January 14, 2015, chest CT scan, the report reads: “Increasing interstitial opacities and septal thickening in the bilateral upper lobes. Mild air trapping in the bilateral upper lobes. Hilar and mediastinal lymphadenopathy. *These findings may be due to sarcoidosis.*” *Id.* at 87 (emphasis added). The report also notes that a September 2009 CT scan's findings were “compatible with sarcoidosis.” *Id.* at 85.

Furthermore, to the extent that Appellant disagrees that the January 2015 VA examination qualifies as a diagnosis of sarcoidosis, the Secretary notes that VA medical examiners are presumed competent in the absence of clear evidence to the contrary, and he has shown no evidence that the examiner did not properly consider the record and independently render a diagnosis. *Rizzo v. Shinseki*, 580 F.3d 1288, 1291 (Fed. Cir. 2009) (a VA medical professional is presumed competent in the absence of affirmative evidence to the contrary).

ii. Medical chronic multisystem illness

To the extent that Appellant argues that his disability qualifies as a medical chronic multisystem illness that is defined by a cluster of signs or symptoms, he

has failed to demonstrate sarcoidosis qualifies under the pertinent law. Indeed, Appellant relies on a patchwork of medical resources and non-contextual record cites to suggest that sarcoidosis is “medically unexplained” and has multiple symptoms. (App. Br. at 10). However, he fails to note that in denying service connection for sarcoidosis, the Board found, among other things, that Appellant’s condition was not a medically unexplained chronic multi-symptoms illness, relying on the January 2015 VA examination. (R. at 10-11 (2-13)). Indeed, the January 2015 VA respiratory condition examination specifically found that sarcoidosis was a disease that occurs across the general population and that current medical literature does not link the development or aggravation of sarcoidosis to Gulf War environmental hazards. (R. at 87 (84-97)).

Notably, Appellant provides no analysis for how sarcoidosis meets the criteria for a medical chronic multisystem illness under 38 U.S.C. § 1117 or 38 C.F.R. § 3.317. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc), *aff’d per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (Appellant has the burden of demonstrating error in a Board decision); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that “the burden of showing that an error is harmful normally falls upon the party attacking the agency’s determination”). Indeed, the regulation provides that the term “medically unexplained chronic multisymptom illness” is defined as a “diagnosed illness without conclusive pathophysiology or etiology, that is characterized by *overlapping symptoms and signs* and has features such as fatigue, pain, disability out of proportion to physical findings, and

inconsistent demonstration of laboratory abnormalities.” See 38 C.F.R. § 3.317(a)(2)(ii) (emphasis supplied). Notably, Appellant makes little showing of any symptoms that are associated with his sarcoidosis and has made *no argument* that any symptoms overlap. See (App. Br. at 10). Additionally, Appellant does not argue that his symptomatology contains “sign or symptom” of a medically unexplained chronic multisymptom illness contained in 38 U.S.C. § 1117 or 38 C.F.R. § 3.317, such as: fatigue; signs or symptoms involving skin; headache; muscle pain; joint pain; neurological signs or symptoms; neuropsychological signs or symptoms; signs or symptoms involving the respiratory system; sleep disturbances; gastrointestinal signs or symptoms; cardiovascular signs or symptoms; abnormal weight loss; or menstrual disorder. 38 U.S.C. § 1117(g); 38 C.F.R. § 3.317(b). Accordingly, Appellant has not met his burden to show error or prejudice. *Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 408-10.

iii. Affirmative evidence

Finally, Appellant argues that the Board improperly relied on the January 2005 VA examination’s finding that there was no medically sound basis in medical literature to link the disease to Gulf War environmental hazards. (App. Br. at 11). However, Appellant again fails to show prejudicial error in the Board’s decision. *Hilkert*, 12 Vet.App. at 151; *Sanders*, 556 U.S. at 408-10. Appellant’s sole contention is that “affirmative evidence” may be used to avoid a finding of service connection “if a veteran satisfies the three basic requirements in 38

U.S.C.S. § 1117 for service connection.” (App. Br. at 11). However, as noted above, Appellant has not met the requirements for service connection, as the medical evidence of record shows a diagnosis of sarcoidosis, which does not qualify as an undiagnosed illness or medically unexplained chronic multisymptom illness. See (R. at 10-11 (2-13)). Accordingly, the Board’s decision should be affirmed.

The Secretary has limited his response to only those arguments raised by Appellant in his brief, and, as such, urges this Court to find that Appellant has abandoned all other arguments not specifically raised in his opening brief. See *Norvell*, 22 Vet.App. at 201. The Secretary, however, does not concede any material issue that the Court may deem Appellant adequately raised and properly preserved, but which the Secretary did not address, and requests the opportunity to address the same if the Court deems it to be necessary.

V. CONCLUSION

In light of the foregoing, Appellee, the Secretary of Veterans Affairs, requests that the Court affirm the June 22, 2015, Board decision.

Respectfully submitted,

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